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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/527,097	03/09/2005	Hans Smola	3712036.00598	3805
29157 7590 11/05/2010 K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690				
EXAMINER				
SUTTON, DARRYL C				
ART UNIT		PAPER NUMBER		
1612				
NOTIFICATION DATE		DELIVERY MODE		
11/05/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

Office Action Summary

Application No.

10/527,097

Applicant(s)

SMOLA ET AL.

Examiner

DARRYL C. SUTTON

Art Unit

1612

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 May 2010.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
4a) Of the above claim(s) 1-9, 12 and 13 is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 10 and 11 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/GS/US)
4) ☐ Interview Summary (PTO-413)
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____
Paper No(s)/Mail Date _____

DETAILED ACTION

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 05/25/2010 has been entered. No new claims have been added.

Applicant's arguments filed 04/20/2010 have been fully considered. Rejections and/or objections not reiterated from previous Office Actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set of rejections and/or objections presently being applied to the instant application.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 10 and 11 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter

which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The term "about 0.025 mg to about 250 mg per kg body weight per day of each of cysteine, vitamin C, vitamin E and grape seed extract" does not appear to be specifically disclosed anywhere in the specification as far as the Examiner can determine. Accordingly, this appears to be new matter; Applicant is required to point out where this term allegedly finds original support.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Winston et al. (US 2003/0008048) in view of Van Dyke (US 5,846,961).

Winston et al. teach a dietary nutritional supplement for helping the body resist the effects of the aging process. The composition is designed to help a user feel healthier, look his or her best, prevent age related cell damage and slow down the physical manifestations of aging that may appear on the outside of the body (Abstract

and [0027]-[0029]). Active ingredients include vitamin C, mixed tocopherols and tocotrienols, N-acetyl-cysteine, Reishi Mushroom extract and Grape seed extract [0011]. A method of use includes taking the two part composition with a medically acceptable protocol. The preferred method involves taking two to four doses of the first component and two to four doses of the second component [0056]. In addition to the ingredients or amounts used in the examples below, other suitable ingredients or amounts include L-Carnitine (60 mg).

L-Carnitine is a suitable alternative for some or all of the Reishi Mushroom and/or Rhodiola Reosea or the Lycopene [0064]. A composition is comprised of 250 mg of vitamin C, 80 mg of N-acetyl-cysteine, 10 mg of Grape seed extract, 135.5 mg of vitamin E and Lycopene [0075].

Winston et al. does not teach the an embodiment comprised of L-carnitine, cysteine, vitamin C, vitamin E, and grape seed extract.

Van Dyke teaches the antioxidant mechanism of cells is controlled by reduced glutathione. L-cysteine and N-acetyl-cysteine act as glutathione precursors (column 5, lines 12-28).

Van Dyke does not teach the specific methods of claim 10 and 11.

At the time of the invention, it would have been obvious to substitute the Reishi mushroom in the composition with 60 mg of L-Carnitine in the composition of Winston et al. since Winston et al. teach that it is a suitable alternate. For a 125 lb user, i.e. 56.7 kg, the limitations of instant claims would provide about 56.7 mg to about 56.7 g of

L-carnitine per day and about 1.4175 mg to about 14.175 g each of cysteine, vitamin C, vitamin E and grape seed extract per day. Further, since Van Dyke et al. teach that both L-cysteine and N-acetyl-cysteine are both glutathione precursors, i.e. antioxidants, it would have been obvious to substitute cysteine for N-acetyl-cysteine in the compositions.

Since the method steps are the same, i.e. administration, and since Winston et al. teach that the supplement helps the body resist the effects of aging and help the user look his best, the method of administering the composition to help a user feel healthier, look his or her best, prevent age related cell damage and slow down the physical manifestations of aging that may appear on the outside of the body would reasonably be assumed to improve skin quality and treat age related skin alterations. And further, since the components of the compositions are substantially the same and in substantially the same amounts, the affects in the body would reasonably be expected to be substantially the same, i.e. stimulation of production and deposition in skin of glycosaminoglycans.

Claims 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malnoe et al. (WO 2002/071874).

Malnoe et al. teach a food composition for improving age-related physiological deficits and extending life span in mammals and method of improving the condition of elderly mammals, particularly those bound to mitochondria dysfunction (page 1, lines 1-8). From an appearance point of view, elderly mammals become thin and have poor

skin condition (page 1, liens 11-12). On the molecular level, it is known that mitochondria function is impaired during aging and this is associated with important functional physical deficits (page 1, liens 24-26). The food composition according to the invention can provide benefits by improving age-related skin quality (page 4, lines 13-18). Preferably, L-carnitine is used in amounts of at least 1 mg to 1g per kg of body weight per day (page 5, lines 25-31). An antioxidant compound such as cysteine is used in association with other antioxidants such as vitamin C, vitamin E and grape seed extract. Preferably the amount of antioxidant is of at least 0.025 mg per kg to 250 mg of body weight per day of body weight per day.

The specific combination of features claimed is disclosed within the broad generic genera/ranges taught by the reference but such "picking and choosing" within several variables does not necessarily give rise to anticipation. Coming Glass Works v. Sumitomo Elec., 868 F.2d 1251, 1262 (Fed. Circ. 1989). Where, as here, the reference does not provide specific motivation to select this specific combination of variables molecules that stimulate energy metabolism of a cell and antioxidants, anticipation cannot be found.

That being said, however, it must be remembered that "[w]hen a patent simply arranges old elements with each performing the same function it had been known to perform and yields no more than one would expect from such an arrangement, the combination is obvious". KSR v. Teleflex, 127 S.Ct. 1727, 1740 (2007)(quoting Sakraida v. A.G. Pro., 425 U.S. 273, 282 (1976)). "[W]hen the question is whether a patent claiming the combination of elements of prior art is obvious", the relevant

question is "whether the improvement is more than the predictable use of prior art elements according to their established functions." (Id.). Addressing the issue of obviousness, the Supreme Court noted that the analysis under 35 USC 103 "need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." KSR v. Teleflex, 127 S.Ct. 1727, 1741 (2007). The Court emphasized that "[a] person of ordinary skill is... a person of ordinary creativity, not an automaton." Id. at 1742.

Consistent with this reasoning, it would have obvious to have selected various combinations of various disclosed ingredients L-carnitine, cysteine, vitamin C, vitamin E, and grape seed extract from within a prior art disclosure, to arrive compositions "yielding no more than one would expect from such an arrangement".

All claims are rejected.

Conclusion

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Darryl C. Sutton whose telephone number is (571)270-3286. The examiner can normally be reached on M-Th from 7:30AM to 5:00PM EST or on Fr from 7:30AM to 4:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frederick Krass, can be reached at (571)272-0580. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

/Darryl C Sutton/
Examiner, Art Unit 1612
/Gollamudi S Kishore/
Primary Examiner, Art Unit 1612